Filed 1/29/10 Erwin v. Sjauw CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

DAVID ERWIN, Plaintiff and Appellant, v. STEPHANIE SJAUW, Defendant and Respondent.	A122067 (Contra Costa County Super. Ct. No. CIVMSC05-01815)

David Erwin (Erwin) brought this negligence action in February 2005 for claimed injury from eye surgery at LasikPlus Vision Center (LasikPlus) in November 2003. He initially named LasikPlus and surgeon George Simon (Simon) as defendants, but a year later added LCA-Vision Inc. (LCA) by a Doe amendment. On a prior appeal by Erwin after a grant of summary judgment in favor of LCA (*Erwin v. LCA-Vision, Inc.* (Dec. 9, 2008, A117852) [nonpub. opn.]) (*Erwin I*), we reversed, rejecting rulings that the entire action was untimely under the year-from-discovery statute and that the Doe amendment did not relate back (Code Civ. Proc., §§ 340.5, § 474).[1]

[1] All undesignated section references are to the Code of Civil Procedure.

Section 340.5 provides: "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. . . ."

Section 474 provides in pertinent part: "When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, . . . and such defendant may be

This second appeal by Erwin is similar. On August 30, 2006, Erwin amended his first amended complaint (FAC) to designate "Stephanie Dea Sjauw, OPT [*sic*]" (Sjauw) as Doe 3. Sjauw answered, asserting the one-year statute as one of her affirmative defenses, and then moved for summary judgment partly on that basis.[2] The motion came before the Honorable Barbara Zuniga (not the same judge as in *Erwin I*), and she found the action timely overall but that the Doe amendment did not relate back. We agree and therefore affirm the resulting judgment of dismissal.[3]

BACKGROUND

Pleadings

A defendant's burden on summary judgment is to negate theories of liability as alleged in the complaint (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342-1343 (*Tsemetzin*)), and so we summarize the FAC. It was filed in Alameda County Superior Court on March 10, 2005, before the case was ultimately transferred to Contra Costa County Superior Court.

The FAC parroted an original complaint filed on February 17, 2005, except for an allegation that 90-days notice of intention to sue a health care provider (MICRA notice)

---

designated in any pleading . . . by any name, and when his true name is discovered, the pleading . . . must be amended accordingly . . . ."

[2] In her motion, Sjauw referred to herself as Stephanie Sjauw, O.D.—i.e., doctor of optometry—rather than using the "OPT" designation of Erwin's pleadings.

[3] The record is confusing. The court first issued a tentative decision that, like the ruling in *Erwin I*, found the entire action and Doe amendment to be untimely. Then, at argument on March 5, 2008, the court discovered a miscalculation in the tentative and held that the action itself was timely. The revised ruling is reflected in an "UNREPORTED MINUTE ORDER DECISION ON MOTION SUBMITTED ON 3-5-08," filed March 17. An order signed April 1, and filed April 16, then grants summary judgment but oddly reiterates the tentative decision without change. Then a notice of entry of judgment, filed April 23, 2008, references an April 1 judgment, also filed April 16, that attaches as an exhibit the "UNREPORTED MINUTE ORDER . . ." showing the change. The first summary judgment order of April 16, without the change, is apparently in error.

Our record and our reversal as to LCA in *Erwin I* suggest that others remain parties below. This judgment was nevertheless appealable as rendering the case final as between Erwin and Sjauw. (*Buckaloo v. Johnson* (1975) 14 Cal.3d 815, 821, fn. 3.)

had been served, a requirement of the Medical Injury Compensation Reform Act (§ 364, subd. (a); *Woods v. Young* (1991) 53 Cal.3d 315, 319-320). The original complaint had illogically alleged that MICRA notice *predated* the surgery. The amended allegation reads: "On or about November 3, 2004 plaintiff served his [MICRA notice], which was a date within 90 days of the one year anniversary date of the 11-19-03 surgery . . . ." The FAC did not specify who was served.

The FAC alleges that the originally named defendants and 50 Does were all responsible for the injuries, and agents and employees of one another. Lasik surgery and attendant treatment performed on Erwin on November 19, 2003, allegedly fell below the standard of care for medical practitioners, to his injury, and defendants, by minimizing the attendant risks, acted without informed consent. A "FIRST CAUSE OF ACTION" is oddly divided into two—one for health care provider negligence and another for lack of informed consent. The named defendants allegedly provided medical services "in the [C]ity of Concord, County of Alameda [*sic*]."

A "SECOND CAUSE OF ACTION," for product liability, does not concern the named or first 24 Doe defendants, but alleges that later-numbered Does manufactured, supplied, sold, or distributed defective or unsafe drugs, medical products and supplies.

Erwin amended his FAC to substitute Sjauw for Doe 3 on August 30, 2006, over 31 months after the surgery and 18 months after the original complaint.

Summary Judgment

Sjauw's motion for summary judgment was based not only on the statute of limitations and effect of the Doe amendment, but also on duty and causation. She presented argument and evidence on whether her professional duties as an optometrist, as opposed to an ophthalmologist like Simon, included evaluating the propriety of Lasik surgery. The court found the latter issues mooted by invalidity of the Doe amendment. We do as well and, accordingly, recite only the showing made on the timeliness issues.

We fashion a chronology from undisputed facts and supporting evidence. On November 10, 2003, Erwin was examined by Sjauw at a LasikPlus facility in Foster City. He knew that this was "part of the LASIK process" he faced and went ahead with the

surgery on November 19, 2003, as performed by ophthalmologist George Simon at the LasikPlus facility in Concord.

Less than a week after the surgery, Erwin reported that his vision was not improving, and within a month he believed that something was wrong. Through a series of follow-up visits at the Concord facility, he felt dryness and burning beyond what he had expected, and had double vision, blurriness, and star-burst patterns he had never experienced before the surgery. He suspected the surgery at that point and gave little thought to the earlier "screening" by Sjauw. He explained in deposition testimony: "I didn't think the screening would have much more to do with more than [*sic*] the operation itself. I think I put more weight on the operation than I did the screening."

Erwin considered having an "enhancement procedure" to correct the problems. He later came to understand, upon a medical referral, that he could not have the procedure because his corneas were too thin.

In July 2004, Erwin suspected that something may have been wrong with the measurements taken by Sjauw. Asked in deposition when he questioned whether the tests were done accurately, he explained: "I know I did in July or late July when I went to Kaiser because they said I had thin corneas. It wasn't really until then that I suspected: Well, if it was thin, wouldn't they know ahead of time? I think that's when I started to look back and say: Well, maybe there was an issue with the screening then because something like a thin cornea would have been seen before surgery. So I think that was a point when I started to really look farther back than before the surgery. [¶] . . . [¶] July of 2004."

On November 3, 2004, Erwin served MICRA notice on Simon and LasikPlus, but not Sjauw. His original complaint, filed February 17, 2005, and his FAC filed March 10, 2005, also named only Simon and LasikPlus.

Erwin's amendment substituting Sjauw as Doe 3 was dated August 28, and filed August 30, 2006. Sjauw was served with summons and the FAC on August 31, 2006.

Controversy focused on what Sjauw claimed was an effort by Erwin to backtrack from his supporting deposition testimony on undisputed material fact (UMF) No. 10—

that he suspected in July 2004 something may have been wrong with the measurements taken by Sjauw, in that he knew his corneas were too thin and that this should have been detected during the screening. Erwin conceded the UMF, but argued in opposition that he did not learn "the facts constituting a cause of action" against Sjauw until August 2006, and he offered in support this declaration: "At the time of filing of the original complaint on February 17, 2005, I did not have knowledge of the probability of responsibility of [Sjauw] for the injuries that are the subject of this action. In particular, I did not know of the following: I was not a good candidate for Lasik surgery, that [Sjauw] had observed astigmatism and a cornea of less than 500 microns that were obvious contraindications—from the perspective of any reputable optometrist—to such surgery, that [Sjauw] had breached the standard of care by authorizing my scheduling for Lasik surgery and by affirmatively communicating to the surgeon that I was eligible for the surgery, and that [Sjauw's] breach of the standard of care had substantially added to the risk of post-operative complications, and that a better outcome likely would have been attained had [Sjauw] complied with the standard of care."

Sjauw objected to the declaration as contradicting Erwin's own discovery (citing *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22 (*D'Amico*)), without foundation, compound, and misstating the evidence.

Erwin filed his Doe amendment adding Sjauw on August 30, 2006.

The court granted summary judgment through an order modifying a tentative decision (fn. 3, *ante*). It found the overall action timely, but that the Doe amendment for Sjauw did not relate back. Sustaining for lack of standing an objection to opposition offered by codefendant Simon, the court found all other evidentiary objections moot as *not relevant* to its decision. The order explains, as to the Doe amendment, that Erwin was not genuinely ignorant of Sjauw's identity, for he knew her identity since undergoing the measurements in November 2003, and that UMF No. 10 showed that he suspected in June or July 2004 that she had taken incorrect measurements. Thus, Erwin knew Sjauw's identity and role in the matter when he filed the action in February 2005, and his August 2006 Doe amendment did not relate back.

DISCUSSION

I. *Review Standards*

"A grant of summary judgment is proper where it appears no triable issues of material fact exist, and judgment is warranted as a matter of law. [Citations.] As the moving party, the defendant must show that the plaintiff 'has not established, and cannot reasonably expect to establish, a prima facie case' on one or more elements of the cause of action. [Citations.] The reviewing court independently examines the record and considers all of the evidence set forth in the moving and opposing papers except that as to which objections have been made and sustained. [Citations.]" (*Hernandez v. Hillsides, Inc.* (2009) 47 Cal.4th 272, 285.) A showing of no prima facie case shifts to the plaintiff a burden of production to show the existence of a triable issue. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar*).)

II. *Timeliness of the Action*

The statute of limitations was one year from accrual—the date when Erwin discovered or reasonably should have discovered his injury (§ 340.5; fn. 1, *ante*) or, more generally, the facts essential to his claim (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 897-898). The surgery was on November 19, 2003, and Sjauw had examined Erwin nine days earlier, in preparation for it. In its initial ruling, the court deemed it "undisputed" that Erwin discovered his injury by November 24, 2003. This holding was later deleted when the court changed its mind about the overall action being untimely, but Sjauw states that Erwin "does not challenge" it. We further observe that an accrual date anytime before the end of December 2003 yields the same timeliness result and that the evidence established that Erwin knew a month after the surgery (i.e., by December 19) that something was wrong and that his vision was not improving.

The original complaint was filed on February 17, 2005, nearly 15 months after accrual, and whether the entire action was timely thus depends in part on the effect of the MICRA notice. A complaint that shows on its face that a claim is otherwise time-barred must state facts showing tolling (*Rogers v. Bank of America* (1956) 140 Cal.App.2d 228, 231) or justification (*McKelvey v. Boeing North American, Inc.* (1999) 74 Cal.App.4th

151, 160, fn. 11). The FAC does allege that MICRA notice was served on November 3, 2004, within the last 90 days of a one-year period from accrual, but evidence shows that Sjauw was not served. (§ 364, subd. (d).)

Service of MICRA notice within the last 90 days of a limitation period tolls that period for 90 days and then allows the rest of the period to play out. Thus, in the case of a one-year statute, a plaintiff could have one year and 90 days in which to file a lawsuit. (*Woods v. Young, supra,* 53 Cal.3d at p. 325.) Here, using any accrual date of November 24 through the end of December 2003, MICRA notice on November 3, 2004, came within the last 90 days of the one-year period, thus making the action timely as first filed on February 17, 2005—i.e., within a year and 90 days of December 2003.

Compounding the analysis, however, is the absence of MICRA notice to Sjauw. MICRA notice extends the filing time only as to defendants who are actually served. (*Godwin v. City of Bellflower* (1992) 5 Cal.App.4th 1625, 1627, 1629-1632 [service on hospital did not extend the limitation period as to known treating physicians]; *Jones v. Catholic Healthcare West* (2007) 147 Cal.App.4th 300, 308; *Derderian v. Dietrick* (1997) 56 Cal.App.4th 892, 898-899.) This issue was clouded in *Erwin I* by argument that notice to LasikPlus, if a registered fictitious business name for LCA, could have effected service on LCA, but there is no such claim here.

The issue is thus whether Erwin, at the time of filing the action, was on inquiry notice of Sjauw as a defendant, but as the court below implicitly recognized, this inquiry is futile because it could not cure the problem that Sjauw was never given MICRA notice. On the other hand, since MICRA notice is not needed to properly add a defendant by Doe amendment (§ 364, subd. (e); *Hazel v. Hewlett* (1988) 201 Cal.App.3d 1458, 1463-1464 (*Hazel*)), the case as to Sjauw turns on the propriety of the Doe amendment.

III. *Effect of the Doe Amendment*

"The general rule is that an amended complaint that adds a new defendant does not relate back to the date of filing the original complaint and the statute of limitations is applied as of the date the amended complaint is filed, not the date the original complaint is filed. [Citations.] A recognized exception to the general rule is the substitution under

section 474 of a new defendant for a fictitious Doe defendant named in the original complaint as to whom a cause of action was stated in the original complaint. [Citations.] If the requirements of section 474 are satisfied, the amended complaint substituting a new defendant for a fictitious Doe defendant filed after the statute of limitations has expired is deemed filed as of the date the original complaint was filed. [Citation.]" (*Woo v. Superior Court* (1999) 75 Cal.App.4th 169, 176 (*Woo*).)

One requirement for applying section 474's relation-back doctrine is that "the new defendant in an amended complaint be substituted for an existing fictitious Doe defendant named in the original complaint" (*Woo, supra,* 75 Cal.App.4th at p. 176). The original complaint and FAC each state standard Doe allegations that all defendants, named or Doe, were "responsible in some manner" for the harm and acted as agents and employees of one another, and these very general allegations satisfied section 474. (*Winding Creek v. McGlashan* (1996) 44 Cal.App.4th 933, 938, 941-942.)

"A further and nonprocedural requirement for application of the section 474 relation-back doctrine is that [the plaintiff] must have been genuinely ignorant of [the defendant's] identity at the time [he] filed [his] original complaint. [Citations.] The omission of the defendant's identity in the original complaint must be real and not merely a subterfuge for avoiding the requirements of section 474. [Citation.] Furthermore, if the identity ignorance requirement of section 474 is not met, a new defendant may not be added after the statute of limitations has expired even if the new defendant cannot establish prejudice resulting from the delay. [Citation.] However, if the plaintiff is actually ignorant of the defendant's identity, the section 474 relation-back doctrine applies even if that ignorance is the result of the plaintiff's negligence. [Citations.]" (*Woo, supra,* 75 Cal.App.4th at p. 177.) A plaintiff ordinarily has no duty of inquiry and may be held ignorant of a defendant's identity if, as this division has held, he once knew the identity but genuinely forgot by the time of filing suit. (*Balon v. Drost* (1993) 20 Cal.App.4th 483, 487-490 (*Balon*); but see *Woo, supra,* 75 Cal.App.4th at pp. 179-180 [adopting *Balon* dissent view that a plaintiff must use readily available information to refresh memory].) There is no claimed memory lapse here. Erwin knew, before his

surgery, the identity of Sjauw and that her examination of him was part of the process leading to the surgery.

While conceding that he knew Sjauw's "identity" in the usual sense, Erwin challenges whether he knew facts giving him a cause of action against her. The phrase "ignorant of the name of a defendant" in section 474 is not taken literally: "It includes situations where the plaintiff ' "knew the identity of the person but was ignorant of the facts giving him a cause of action against the person [citations] . . . ." ' " (*Hazel*, *supra*, 201 Cal.App.3d at p. 1464.) " ' "Ignorance of the facts is the critical issue . . . ." [Citations.]' [Citation.] 'The pivotal question in this regard is "did plaintiff know *facts*?" not "did plaintiff know or believe that [he] had a cause of action based on those facts?" [Citation.]' " (*Id.* at p. 1465.)

The propriety of the Doe amendment went to Sjauw's defense of the statute of limitations, and she bore the burden of demonstrating each element of that defense (*Consumer Cause, Inc. v. SmileCare* (2001) 91 Cal.App.4th 454, 467-468), including, in this context, Erwin's lack of true ignorance. (*Breceda v. Gamsby* (1968) 267 Cal.App.2d 167, 176-179 [plaintiff unaware before filing suit that Doe defendant had committed the acts for which he was sued].) Erwin knew who Sjauw was and that her examination had been part of the process leading to his Lasik surgery, which he knew within a month had gone awry. As for further facts giving Erwin a cause of action, Sjauw relied on UMF No. 10, that Erwin suspected in July 2004 that something may have been wrong with the measurements she made, in that he knew by then that his corneas were too thin and reasoned that this should have been detected during the screening. If those facts sufficed in July 2004, then his failure to name Sjauw in his February or March 2005 complaints prevented his August 2006 Doe amendment from relating back.

But there is more, and this brings us to Erwin's declaration in opposition and to Sjauw's *D'Amico* objection below that those parts of the declaration at odds with his earlier deposition testimony supporting UMF No. 10 must be disregarded as contradicting Erwin's own discovery. (*D'Amico*, *supra*, 11 Cal.3d at pp. 21-22.) The short answer is a procedural one. The trial court never ruled on that objection, apparently reasoning that it

was among those objections rendered moot by the court's decision that the Doe amendment did not relate back. In truth, the *D'Amico* objection was important to that question, not mooted by it, but Sjauw never called this error to the court's attention or secured a ruling. Failure to secure a ruling waives an evidentiary objection and requires an appellate court to treat the evidence as admitted. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 670, fn. 1; *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564, 566, 575; *Laird v. Capital Cities/ABC, Inc.* (1998) 68 Cal.App.4th 727, 736.) We therefore do so, and this answers Erwin's arguments that the court "erred in not considering" his declaration or that *D'Amico* is distinguishable and, in any event, inconsistent with current section 437c, subdivision (c). We deem the declaration to have been considered below; we therefore consider it here.[4]

---

[4] Three further arguments by Erwin are unnecessary to reach. One is that section 474, unlike cause-of-action-accrual-rules, does not require a plaintiff to use reasonable diligence to discover the facts. This is settled law in our division (*Balon, supra,* 20 Cal.App.4th at pp. 487-490), as elsewhere (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170-1172 [see collected cases]), and even if it were not, nothing in the record shows that the court below departed from that notion. Second and third arguments are that *Woo* erroneously eroded that concept by holding, consistent with a dissent in *Balon* (*Balon*, at pp. 490-494 [dis. opn. by Phelan, J.]), that where a plaintiff claims lapse of memory, she must at least utilize readily available information within her possession to refresh her recollection (*Woo, supra,* 75Cal.App.4th at pp. 179-180). Again, however, our division has made its position clear in *Balon*, and what makes this argument even more puzzling is that we do not see in this case any issue about Erwin not resorting to readily available information.

We reject a fourth further argument as lacking precedent. Erwin insists that we cannot find lack of relation back because Sjauw did not raise as a UMF, and the court did not find, that Erwin "willfully or intentionally misused" the Doe procedure or "feigned" his ignorance of facts. He cites no direct authority for this notion, but we infer that he gleans it from case law discussion that section 474 requires real or genuine ignorance and is not available where a plaintiff feigns ignorance. (*General Motors Corp. v. Superior Court* (1996) 48 Cal.App.4th 580, 589-590 (*General Motors*).) We can imagine a plaintiff simply lying to invoke section 474, a court or jury finding bad faith so as to defeat reliance on section 474, and an appellate court upholding such a finding if supported by substantial evidence. (*Breceda v. Gamsby, supra,* 267 Cal.App.2d at p. 176.) But here, we review summary judgment, where questions of credibility and good or bad faith, unless overwhelmingly established, are factual and inappropriately resolved

Returning to Sjauw's showing on the motion, we hold that UMF No. 10 and the supporting evidence created a prima facie showing that shifted to Erwin the burden of production to show the existence of a triable issue. (*Aguilar*, *supra*, 25 Cal.4th at p. 850.) Erwin knew, upon filing the action in February 2005, that his vision was damaged by the surgery, and so the question is whether he knew enough to name Sjauw. The test has been articulated variously. Plaintiff must know that person's *connection with the case or his injuries* (*General Motors*, *supra*, 48Cal.App.4th at p. 594), must have *facts that would cause a reasonable person to believe that liability is probable* (*McOwen*, *supra*, 153 Cal.App.4th at p. 943), and must have more than *suspicion of wrongdoing* (*General Motors*, at p. 595). The distinction between mere suspicion and sufficient facts is the difference between " 'suspicion that some cause *could exist* and a factual basis to believe a cause *exists* . . . . The former is one reason attorneys include general charging allegations against fictitiously named defendants; the latter requires substitution of the defendant's true name. . . .' [Citation.]" (*Ibid.*)

UMF No. 10 was that Erwin suspected in July 2004 that something may have been wrong with the measurements taken by Sjauw. He knew that his prior examination by Sjauw was part of the Lasik surgery process, and he stated in deposition that he

---

on the motion. A triable issue of fact requires denial of the motion and resolution by a trier of fact. (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 947-948 [triable issue about plaintiff's knowledge of defendant's identity under section 474 mandated reversal of summary judgment] (*McOwen*).) And while there may be cases of out-and-out lying, we suspect that most summary judgment cases are like the one before us, where no one charges lying or perjury, but where relation back is determined on undisputed facts showing what the plaintiff knew and asking the court whether those facts constitute sufficient knowledge as a matter of law. A ruling accepting or rejecting relation back in this context may imply good or bad faith in the sense of section 474's policy underpinnings, but we know of, and are cited, no authority that there must always be an affirmative finding of bad faith in order to hold that an amendment under section 474 does not relate back.

Finally, a fifth further defect posited by Erwin—that Sjauw failed to show she was prejudiced by his delay in making the Doe amendment—is contrary to law. The absence of prejudice to the substituted defendant is immaterial. (*Woo*, *supra*, 75 Cal.App.4th at p. 177; *Hazel*, *supra*, 201 Cal.App.3d at p. 1466.)

questioned the accuracy of the tests "when I went to Kaiser because they said I had thin corneas. It wasn't really until then that I suspected: Well, if it was thin, wouldn't they know ahead of time? I think that's when I started to look back and say: Well, maybe there was an issue with the screening then because something like a thin cornea would have been seen before surgery. So I think that was a point when I started to really look farther back than before the surgery." This shows that Erwin reasoned, before he instituted the action, that Sjauw was responsible for mis-measuring or failing to appreciate the significance of his thin corneas.

Erwin discounts the quoted testimony by stressing that he went to Kaiser for advice about an enhancement, a *secondary* procedure and that nothing shows him having been advised then that his corneas had been too thin for the *initial* surgery.[5] This effort fails, however, because his testimony necessarily implies that he knew there was a causal connection between corneal thickness and the advisability the initial surgery; otherwise,

---

[5] Erwin testified in an earlier August 2006 deposition, for example: "Q. . . . So your testimony is that you started to wonder what was going wrong in July of 2004?

"A. Yeah. I knew something was going wrong before then, but I always had in the back of my mind the possibility of that enhancement, and so my questioning became 'Why is my enhancement being delayed?' And that led me to question after my enhancement never happened, 'What the heck's going on with my eyesight?'

"Q. Did you ever come to understand why you couldn't have an enhancement?"

"A. My best understanding is that my corneas are too thin, because they did it once and it screwed them up. So a second time, my understanding, is that the cornea's so thin that it would just lose structural integrity.

"Q. And how did you come to hear that information? Except from anything that your lawyers have told you.'

"A. Right.

"From Dr. Manche, who was referred to me by Dr. Simon's office, at Stanford, he outlines very clearly that he thought it was ectasia, and then he actually explained it very well to me. I don't want to get too detailed, but he explained it like if you've ever seen a garden hose that's been nicked and starts to swell up, and said that's what it's like; it's like it's been cut so thin that you're getting a bulging that's going on. So it's actually a physical phenomenon of actually changing shape. And so that's kind of what got me curious about it and made me look into it."

We learn elsewhere in the record that Erwin eventually achieved stable vision through a corneal transplant in his left eye.

his suspicion as to Sjauw made no sense. She examined him for the first surgery, not a second procedure. And we add that, while Erwin used the word "suspected" in the quoted material, this was not *mere* suspicion, but a suspicion grounded in the facts that he knew Sjauw should have seen corneal thinness before the surgery and (by necessary implication from his "suspicion") should have known that this was something that weighed against having Lasik surgery. Only two logical conclusions flowed from his "suspicion" of malpractice: either Sjauw fell short in measuring his corneas or, perhaps, fell short in not recommending against the surgery. Either way, liability was probable (*McOwen, supra,* 153 Cal.App.4th at p. 943), and Sjauw was the culprit.

To reiterate, this showing was enough to shift the burden of production to show the existence of a triable issue (*Aguilar, supra,* 25 Cal.4th at p. 850), and so we proceed to consider Erwin's opposing declaration.

In the declaration, Erwin urged that he did not learn "the facts constituting a cause of action" against Sjauw until August 2006. He expounded: "At the time of filing of the original complaint . . . , I did not have knowledge of the probability of responsibility of [Sjauw] for the injuries that are the subject of this action. In particular, I did not know [that] I was not a good candidate for Lasik surgery, that [Sjauw] had observed astigmatism and a cornea of less than 500 microns that were obvious contraindications—from the perspective of any reputable optometrist—to such surgery, that [Sjauw] had breached the standard of care by authorizing my scheduling for Lasik surgery and by affirmatively communicating to the surgeon that I was eligible for the surgery, and that [Sjauw's] breach of the standard of care had substantially added to the risk of post-operative complications, and that a better outcome likely would have been attained had [she] complied with the standard of care."

To the extent that the declaration stressed ignorance of legal concepts—the probability of responsibility, the standard of care, whether Sjauw's conduct "substantially added to the risk of post-operative complications," and whether "a better outcome likely would have been attained" absent the asserted errors—the answer is this: " ' "Ignorance of the facts is the critical issue . . . ." [Citations.]' [Citation.] 'The pivotal question in

this regard is "did plaintiff know *facts*?" not "did plaintiff know or believe that [he] had a cause of action based on those facts?" [Citation.]' " (*Hazel, supra,* 201 Cal.App.3d at p. 1465.) Ignorance of legal tests and phrasing for malpractice claims was immaterial for purposes of section 474.

Examined for "facts" as opposed to legal concepts, the declaration is simply that Erwin, upon filing the action in February 2005, did not know (1) that he "was not a good candidate for Lasik surgery," or (2) that Sjauw had seen "obvious contraindications" of "astigmatism and a cornea of less than 500 microns." The question is, what effect did this have on his concession of UMF No. 10, and supporting deposition, that he knew by July 2004 that his corneas were too thin, and that he felt that this should have been detected during screening and that something may have been wrong with the measurements Sjauw took.

A threshold problem ignored by both sides is that, while Erwin speaks of not knowing he was not a "good candidate" for the surgery or knowing that Sjauw had seen "astigmatism and a cornea of less than 500 microns," this only *implies* that she did in fact report him to be a good candidate and observed astigmatism and a cornea of less than 500 microns. Erwin does not identify where in the record these things were shown *directly.* He offered a declaration by certified ophthalmologist Mark Golden, his proffered expert on standard of care, that Sjauw breached that standard by missing "key signs" that made Erwin a "non-candidate" for the surgery, and that she "checked the box which affirmed that candidacy." Golden also reports (albeit as double hearsay) that Erwin "reports that Dr. Sjauw told him he was a candidate" for the process. Sjauw raised evidentiary objections to the Golden declaration, including lack of foundation, but the court never reached the objections, apparently deeming the declaration pertinent *only* to standard of care, an issue the court did not reach. Again, as earlier in this opinion, we treat the failure to secure rulings on the declaration as waiving all objections and requiring that we deem the declaration admitted in full. (*Ann M. v. Pacific Plaza Shopping Center, supra,* 6 Cal.4th at p. 670, fn. 1.) That waiver, combined with our duty to view opposition evidence *and inferences* most favorably to the opposing party

(*Aguilar*, *supra*, 25 Cal.4th at p. 843), persuades us to accept that Sjauw did in fact make the observations and indicate that Erwin was an appropriate candidate.

We conclude that the showing did not raise a triable issue of fact regarding Erwin's ignorance of the facts supporting Sjauw's involvement. That Erwin did not know, upon filing the action, that Sjauw had seen "astigmatism and a cornea of less than 500 microns," did not change the fact that he felt she was to blame for missing his thin corneas. He evidently did not premise his doubts of her competency on any particular number of microns, and if astigmatism was a further "contraindication" that he was not a good candidate for Lasik surgery, it did not change the concededly known problem that he had thin corneas. "[A] plaintiff need not be aware of each and every detail concerning a person's involvement before [he] loses his ignorance" (*General Motors*, *supra*, 48 Cal.App.4th at pp. 594-595), and the same principle applies to Erwin's ignorance that Sjauw had actually checked a box on a form indicating that he was a proper candidate for the surgery. Dueling expert testimony on the motion raised questions whether the evaluation of candidacy, as opposed to taking measurements of the patient, was within the professional purview of an optometrist, as well as an ophthalmologist like Simon, and while the court ultimately never resolved evidentiary objections in that regard due to not reaching the questions of duty or breach, this was not determinative on the question of ignorance. We need not examine whether Erwin *should have known* of Sjauw's liability, for he *actually felt* that she was at fault for mis-measuring *or* failing in some other way to realize that he had thin corneas that "contraindicated" his candidacy for Lasik surgery. Whether assessment of his candidacy in the face of evidence of thin corneas was the ultimate professional responsibility of Sjauw, Simon or both, Sjauw's critical role in the decision was known to Erwin, and he never claimed ignorance that she did in fact measure his corneas. And while we need not look further, we do observe that both experts agreed that Sjauw made the corneal measurements, whereas Simon did not.

Finally, Erwin relies on Sjauw's proffered expert opinion, by Volpicelli, that she performed all measurements properly, as a species of admission by her for knowledge purposes. He reasons: "Under these circumstances, Erwin's suspicion in July 2004 that

[Sjauw] had not accurately measured and reported the cornea thickness . . . was an error and . . . not knowledge of all the basic facts showing a cause of action against [her]." The argument is misguided. The dispositive issue here is knowledge at the time of filing suit. Whether the experts raised a triable issue as to duty of care or breach of duty is a question not reached below, and not reached here. We are aware of no authority that a plaintiff's good faith ignorance or knowledge, for purposes of a Doe amendment under section 474, is materially affected by what an expert might later opine on the ultimate question of liability.

In summary, Sjauw's prima facie showing on the motion shifted the burden of production to Erwin, who's showing failed to raise a triable issue of material fact on the question of knowledge under section 474. Therefore, the Doe amendment did not relate back, and summary judgment was properly granted in Sjauw's favor.

DISPOSITION

The judgment of dismissal following summary judgment is affirmed.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.